PIEDMONT & NORTHERN RY. CO. ET AL. *v.* UNITED STATES ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF SOUTH CAROLINA.

No. 164. Argued January 22, 1930.—Decided February 24, 1930.

1. An interstate railway, using only electric power, being about to extend its line, and having been notified by the Interstate Commerce Commission that, before doing so, it would be expected to apply for a certificate of public necessity and convenience, under § 1, pars. 18–22, of the Interstate Commerce Act, made formal application accordingly but therein moved that its application be dismissed for want of jurisdiction, upon the ground that the railway was an interurban electric railway, exempted by par. 22 from the requirement of such a certificate. The Commission assumed jurisdiction and denied the application on its merits. In a suit to set aside the order, *held* that, if the Commission had jurisdiction, its order denying the application, being negative in substance as well as in form and infringing no right of the railway, is not subject to judicial review; while, if the Commission lacked jurisdiction, its order is entirely nugatory and presents no new obstacle to the railway from which it may be relieved by judicial action. P. 476.
2. A remedy which is in substance a declaratory judgment that the railway is within the exemption contained in paragraph 22 of the Act, is not within the statutory or the equity jurisdiction of the federal courts. P. 477.
3. Where a bill in the District Court was dismissed on the merits when it should have been dismissed for want of jurisdiction, the decree must be reversed with directions to dismiss for want of jurisdiction. P. 478.

30 F. (2d) 421, reversed.

APPEAL from a decree of the District Court of three judges dismissing on the merits a suit to set aside, and to enjoin action under, an order of the Interstate Commerce Commission.

Messrs. Charles E. Hughes, Cameron Morrison, H. J. Haynsworth, and *W. S. O'B. Robinson, Jr.,* on behalf of the Piedmont & Northern Railway Co., and *Mr. John E. Benton,* on behalf of the National Association of Railroad and Utilities Commissioners, submitted a jurisdictional statement for the appellants.

I. No complaint is here made with respect to that part of the order merely refusing a certificate of public convenience and necessity. A review of that portion of the order would involve but an exercise by the court of the administrative function of granting a request which the Commission denied. *Chicago Junction Case,* 264 U. S. 258, 264.

But the challenge is directed to that part of the order affirmatively declaring the status of appellant as a carrier within the operation of paragraph 18 of § 1 of the Act. This part was not the result of an administrative function of the Commission, nor was it requested by the appellant. On the contrary, it was a judicial determination of the scope of the statutory authority of the Commission, the occasion for which was brought about solely at the instance of the Commission itself, and over the objection of the appellant. The question whether, upon the facts established, the Commission exceeded its authority under paragraph 18, and thereby deprived appellant of the immunities expressly conferred by paragraph 22 upon interurban electric railways, is purely a question of law and clearly subject to judicial review. *Intermountain Rate Cases,* 234 U. S. 476, 490; *Tap Line Cases,* 234 U. S. 1, 10, 22; *United States* v. *American Ry. Express Co.,* 265 U. S. 425. Contrast, *United States* v. *Los Angeles & S. L. R. Co.,* 273 U. S. 299, 309, 310.

II. That the issue whether appellant is the type of carrier requiring a certificate under paragraph 18 for the "extension" of its lines is justiciable and not declaratory or advisory in character appears from the statement of

this Court in *Texas & Pacific R. Co.* v. *Gulf, C. & S. F. R. Co.*, 270 U. S. 266, 272–273.

The mere form of the order entered, incorporating findings contained in the Commission's report and dismissing the petition without more, does not change its inherent character. The effect of the order in the present case was to grant to various steam railways (which intervened and opposed the petition) the affirmative relief which they sought, namely, that appellant be prevented from constructing the proposed lines, and, as a means of bringing about this end, that the Commission should assume authority over appellant under paragraph 18, and that the certificate required by said paragraph be denied.

Had the Commission refused the relief sought by the interveners, and had it permitted appellant to construct its lines, the interveners would have had the right, on the authority of the *Chicago Junction Case*, 264 U. S. 258, 264, to sue to annul any order of the Commission allowing appellant to complete its lines.

It follows that appellant can sue to annul an order granting the relief sought by the interveners. *United States* v. *New River Co.*, 265 U. S. 533, 537, 539, 541.

That appellant has suffered legal injury by reason of the order is obvious (see *Chicago Junction Case*, 264 U. S. 258). It in effect commands appellant not to build the lines, for unless the status established by the order is removed, appellant cannot construct the proposed lines without subjecting itself to fines and penalties, § 1 (20) of the Act, or issue new securities, § 20–a of the Act, or be free to exercise the power of eminent domain. *Alabama & Vicksburg R. Co.* v. *Jackson & Eastern R. Co.*, 271 U. S. 244.

The following decisions are also believed to sustain the jurisdiction of this Court on appeal: *St. Louis & O'Fallon R. Co.* v. *United States*, 279 U. S. 461; *United States* v. *Missouri Pacific R. Co.*, 278 U. S. 269; *Baltimore*

& Ohio R. Co. v. *United States,* 277 U. S. 291; *Brimstone Railroad & C. Co.* v. *United States,* 276 U. S. 104; *Cleveland, C., C. & St. L. R. Co.* v. *United States,* 275 U. S. 404.

Mr. W. S. O'B. Robinson, Jr., with whom *Messrs. Cameron Morrison* and *H. J. Haynsworth* were on the brief, argued the case for the Piedmont & Northern Railway Co.

Great Northern R. Co. v. *United States,* 277 U. S. 172, when read in connection with *Texas & Pacific Ry. Co.* v. *Gulf, C. & S. F. R. Co.,* 270 U. S. 266, would seem to put at rest all doubt about the jurisdiction of the court below to entertain this suit under the Urgent Deficiencies Act.

The order affirmatively determining the character and status of the mileage in question would, we assume, in view of the decision in the *Texas & Pacific* case, be given binding effect in any future suit or proceeding involving the right of the Railway Company to construct the mileage, unless set aside or annulled. See *Interstate Commerce Commission* v. *Illinois Cent. R. Co.,* 215 U. S. 452, 469, 470; *Interstate Commerce Commission* v. *Union Pac. R. Co.,* 222 U. S. 541, 547; *Interstate Commerce Commission* v. *Louisville & N. R. Co.,* 277 U. S. 88; *Manufacturers Ry. Co.* v. *United States,* 246 U. S. 457, 489.

Mr. John E. Benton, with whom *Mr. Clyde S. Bailey* was on the brief, argued the case for the National Association of Railroad and Utilities Commissioners.

Attorney General Mitchell, Assistant to the Attorney General O'Brian, and *Messrs. Claude R. Branch* and *Charles H. Weston,* Special Assistants to the Attorney General, for the United States, submitted on the brief of the Interstate Commerce Commission.

Mr. Daniel W. Knowlton for the Interstate Commerce Commission.

Mr. Sidney S. Alderman, with whom *Messrs. L. E. Jeffries, S. R. Prince, James F. Wright, Carl H. Davis, F. B. Grier, Edward S. Jouett, Wm. C. Burger* and *James L. McLaughlin* were on the brief, for the Southern Railway Company and other interveners, appellees.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

Paragraph 18 of § 1 of the Interstate Commerce Act, as amended by Transportation Act, 1920, February 28, c. 91, § 402, 41 Stat. 456, 477–8, prohibits any carrier by railroad subject to that Act from undertaking any extension of its lines or construction of new lines, without first obtaining from the Interstate Commerce Commission a certificate of public necessity and convenience. Paragraphs 19 and 20 provide for applications for certificates and prescribe the procedure and mode of disposal. Paragraph 22 exempts from the scope of those provisions the construction of industrial and certain other tracks "located wholly within one State, or of street, suburban, or interurban electric railways, which are not operated as a part or parts of a general steam railroad system of transportation."

The Piedmont & Northern Railway, a carrier by railroad subject to the Interstate Commerce Act, operates in interstate commerce about 128 miles of line in North and South Carolina, using exclusively electric locomotives. It determined to extend its lines 53 miles on one route and 75 miles on another, in order to connect with several steam railroads; and, believing that the above provisions of the Act were inapplicable, it intended to make the proposed extensions without securing from the Commission a certificate of public necessity and convenience. The Commission, learning informally of the project, advised the Railway by letter that before it "constructs any extensions to its line or issues any securities it will be expected

to file appropriate applications for authority therefor under sections 1 and 20a. The filing of such applications will, of course, be without prejudice to your right to assert that the Commission has no jurisdiction over your property in those respects and to adduce whatever evidence you may desire to support such contention." The letter called attention to the following passage in *Texas & Pacific Ry. Co.* v. *Gulf, Colorado & Santa Fe Ry. Co.*, 270 U. S. 266, 272:

" Whenever such an application is made, the Commission may pass incidentally upon the question whether what is called an extension is in fact such; for, if it proves to be only an industrial track, the Commission must decline, on that ground, to issue a certificate. A carrier desiring to construct new tracks does not, by making application to the Commission, necessarily admit that they constitute an extension. It may secure a determination of the question, without waiving any right, by asserting in the application that in its opinion a certificate is not required because the construction involves only an industrial track."

Upon receipt of this letter, the Railway filed an application for a certificate of public necessity and convenience; and it asserted therein that the proposed extensions were parts of a single project undertaken prior to the effective date of paragraph 18[1] and that it was an interurban electric railway within the exemption of paragraph 22. It accordingly moved that its application be dismissed for want of jurisdiction. The Commission overruled the motion; took jurisdiction; and entered an order denying the application on its merits. *Proposed Construction of Lines by Piedmont & Northern Ry. Co.*, 138

[1] Compare Application of Uvalde & Northern Ry. Co., 67 I. C. C. 554; Application of Texas, Oklahoma & Eastern R. R. Co., 67 I. C. C. 484; Application of Gulf Ports Terminal Ry. Co., 71 I. C. C. 759.

I. C. C. 363. This suit was then brought by the Railway against the United States in the federal court for western South Carolina, under the Urgent Deficiencies Act, October 22, 1913, c. 32, 38 Stat. 208, 219, 220, U. S. C., Tit. 28, § 47, and, as the bill states, also under "the general equity jurisdiction" of the court. The bill charges that if the order is not set aside, the Railway "will be prevented from constructing the new mileage"; and prays for "a permanent injunction decreeing that the Commission was without jurisdiction of the application," that the order "taking jurisdiction of said application and denying the same, be set aside and annulled, and that the Commission be forever enjoined from taking any action or proceeding against your petitioner under said order." The National Association of Railroad and Utility Commissioners intervened as plaintiff. The Interstate Commerce Commission, the Southern Railway and other steam railroads intervened as defendants. The Commission moved to dismiss the bill for want of jurisdiction. The court, three judges sitting, denied the motion; and, the case being submitted on final hearing upon the pleadings and the record before the Commission, entered a decree dismissing the bill on the merits. 30 F. (2d) 421. A direct appeal to this Court was taken by both plaintiffs under § 238 (4) of the Judicial Code, as amended by the Act of February 13, 1925, c. 229, 43 Stat. 936, 938; U. S. C., Tit. 28, § 345.

Plaintiffs do not complain of the order's denial of a certificate of public necessity and convenience. They concede that no court has the power to compel the Commission to issue such a certificate, since no railroad subject to the provisions of the Act has a right to extend its lines. Therefore, the order denying a certificate, being negative in substance as well as in form, infringed no right of the Railway. Compare *Proctor & Gamble Co.* v. *United States*, 225 U. S. 282; *Lehigh Valley R. R. Co.* v.

United States, 243 U. S. 412; *United States* v. *New River Co.,* 265 U. S. 533, 540. The plaintiffs have also abandoned, in this Court, their contention that the proposed extensions are part of a project undertaken prior to the effective date of paragraph 18. Their sole contention is that the court below and the Commission erred in not holding that the Railway is an interurban electric railway within the exemption of paragraph 22. The defendants renew their objections to the jurisdiction of the court.

We think that the defendants' objection is well taken. There is no allegation of fact in the bill, and no provision in the statute, which supports the charge that the order will prevent the Railway from proceeding with the construction of the new mileage. The order is wholly unlike a decree which dismisses a bill in equity on the merits when it should have been dismissed for want of jurisdiction. Such a decree must be set aside because, otherwise, it might be held to operate as *res judicata.* Compare *Swift & Co.* v *United States,* 276 U. S. 311, 325–6; *New Orleans* v. *Fisher,* 180 U. S. 185, 196; *Dowell* v. *Applegate,* 152 U. S. 327, 337–41. But neither the assumption of jurisdiction by the Commission nor its denial of the application can operate as *res judicata* of the Railway's claim of immunity. If, as is contended, the Commission was without jurisdiction, the Railway is as free to proceed with the construction as if the application had not been made and the Commission had not acted. Nothing done by the Commission can prejudice the Railway's claim to immunity in any other proceeding.

It is true that, if the Railway builds without having secured a certificate, it may suffer serious loss. For, a court may hold, in an appropriate proceeding, that the Railway is within the purview of paragraph 18. And the Railway may be thus subjected to the penalties prescribed by paragraph 20. These risks arise, however, not from

the order, but from the statute. Compare *Lehigh Valley R. R. Co.* v. *United States,* 243 U. S. 412, 414. The order is entirely negative. It is not susceptible of violation and cannot call for enforcement. It does not finally adjudicate the Railway's standing; nor does it enjoin it to do or refrain from doing anything. The penalties provided in paragraph 20 are prescribed not for violation of an order of the Commission, but for violation of the provisions of the statute. And the apprehended loss will be no greater by virtue of the Commission's order than if the Railway had commenced building without trying to secure a certificate, as was done in *Texas & Pacific Ry. Co.* v. *Gulf, Colorado & Santa Fe Ry. Co.,* 270 U. S. 266. There is no suggestion in the bill how the Commission or the Government could conceivably take any action under the order.

The action taken by the Commission may lend greater justification to the Railway's fear of the uncertainty instinct in the prophecy as to whether it will be held to be an interurban electric within the meaning of paragraph 22. But it does not alter the substance of the remedy sought. That is the same as if the suit had been brought by the Railway prior to any action by the Commission, except that the Railway may be bound by the record made before the Commission. The relief which plaintiffs seek is not from the order but from the uncertainty as to the applicability of the statute. If the statute gives the Commission jurisdiction over the Railway's application, then concededly the order is not subject to attack. If, on the other hand, the statute does not confer the jurisdiction, then obviously the order is no obstacle to the Railway's plans. What plaintiff's are seeking is, therefore, in substance, a declaratory judgment that the Railway is within the exemption contained in paragraph 22 of the Act. Such a remedy is not within either the statutory or the equity jurisdiction of federal courts. Com-

pare *Willing* v. *Chicago Auditorium Association*, 277 U. S. 274; *Great Northern Ry. Co.* v. *United States*, 277 U. S. 172, 182; *Liberty Warehouse Co.* v. *Grannis*, 273 U. S. 70, 74; *United States* v. *Los Angeles & Salt Lake R. R. Co.*, 273 U. S. 299.

There is nothing in the passage from *Texas & Pacific Ry. Co.* v. *United States*, 270 U. S. 266, 272, quoted by the Commission, which is inconsistent with the conclusion stated above. The case is entirely different from those cases where an application for a certificate is alleged to have been erroneously granted, as in *The Chicago Junction Case*, 264 U. S. 258 and *Colorado* v. *United States*, 271 U. S. 153. There, a judicial review is provided in order to protect a legal right of the plaintiff alleged to have been infringed by an order which authorizes affirmative action.

Since plaintiffs' bill was dismissed on the merits when it should have been dismissed for want of jurisdiction, the decree must be reversed with directions to dismiss the bill for want of jurisdiction. *Smallwood* v. *Gallardo*, 275 U. S. 56, 62; *Shawnee Sewerage & Drainage Co.* v. *Stearns*, 220 U. S. 462, 471; *Blacklock* v. *Small*, 127 U. S. 96, 105. Compare *United States* v. *Anchor Coal Co.*, 279 U. S. 812; *Gnerich* v. *Rutter*, 265 U. S. 388, 393; *Brownlow* v. *Schwartz*, 261 U. S. 216, 218.

Reversed with direction to dismiss the bill for want of jurisdiction.

UNITED STATES *v.* GUARANTY TRUST COMPANY OF NEW YORK ET AL.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

No. 402. Argued January 6, 7, 1930.—Decided February 24, 1930.

1. In providing by Title II of the Transportation Act (1) for the funding of indebtedness of railroad carriers to the United States,